No. 12,145

IN THE

United States Court of Appeals

For the Ninth Circuit

W. M. (alias Bill) GILLIS,
(Plaintiff) Appellant,

vs.

BEN F. GILLETTE and
IRENE GILLETTE,
(Defendants) Appellees.

BRIEF FOR APPELLEES.

(Plaintiff's Second Appeal.)

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INTRODUCTION.

It is apparent to us, at the outset, that the appellant has failed to comply with Rule 20(d) of this Court. Unless one could treat the paragraph entitled "Summary of Questions Involved" as a sufficient compliance with said rule, there is no specification of the errors appellant relies upon anywhere in the brief. In the said summary the Court is referred to a transcript page number for information as to appellant's specifications of error. This does not satisfy the rule.

Peck v. Shell Oil Co. (CCA 9), 142 F. (2d) 141, 143;

Thiel v. Southern Pacific Co. (CCA 9), 169 F. (2d) 30.

Nowhere prior to the section in the brief entitled "Argument" is there any particularity. It also fails to supply the specification. That part of his brief entitled "Summary" (Br. p. 5), asserts that the questions raised by this appeal may be summarized by stating the six questions there set forth. All but one of them unquestionably show that appellant intends to raise by the questions listed questions respectively on the sufficiency of the evidence to support (not a conclusion of law as there stated, but) a Finding of Fact. The first question is the one exception we mentioned. It, as shown in appellant's Argument of it, Sub. (2), Br. p. 7, attempts also to raise a question on the sufficiency of the evidence.

ARGUMENT.

I. THE AGREEMENT.

Despite appellant's failure in his brief to properly raise such question, we intend nevertheless to now reply to his argument in reference to the sufficiency of the evidence by quoting some of the testimony in the record. He claims under his second question on page 9 of his brief that no agreement was arrived at on or about August 8, 1946 as stated in Paragraph III of the Findings of Fact. (T. p. 44.) His argument on this point indicates that in order that there be an agreement, that the whole agreement be in writing. This, apparently, is his contention. Otherwise it is unexplainable. A cursory examination of the testimony, relative to the agreement, indicates quite positively that the evidence supports the findings.

In endeavoring to decide how much of the testimony o quote, we shall be ever mindful of the rule that vhere the Court has considered conflicting evidence ınd made its findings thereon, the trial Court is pre- umptively correct—the trial Court, being the exclu- ive judge of the weight of the evidence and the credi- ility of the witnesses.

Columbian Nat'l Ins. Co. v. Quandt (CCA 9), 154 F. (2d) 1006;

Lassiter v. Atkinson Co. (CCA 9), 176 F. (2d) 984, 993;

Grace Bros., Inc. v. Comm. Int. Rev. (CCA 9), 173 F. (2d) 425;

Rothman v. Wilson (CCA 9), 121 F. (2d) 1000;

Wingate v. Bercut (CCA 9), 146 F. (2d) 725.

In determining whether there was sufficient basis ı the evidence for the trial Court's Findings of Fact, his Court is, we submit, required to take that view f the evidence which is most favorable to the ap- ellees.

Smith v. Porter, 143 F. (2d) 292.

The testimony selected by us in the light of the said ecisions follows:

(For purposes of convenience we shall henceforth ı quoting testimony refer to appellee Ben F. Gillette s Ben, and to appellee Irene Gillette as Irene.)

Ben testified (T. p. 164):

"A. I saw the agreement—I took it for an agreement, a contract.

Q. When was that, Ben?

A. Well, when she—my wife got it up at the Nome Motors office and brought it down.

Q. About what time was that?

A. Well, I would say it was around the *8th of August.* That was when the agreement was made. It was later than that that we got it, I think.

Q. Ben, I will show you defendant's Exhibit No. 1 and ask you if you recognize it?

A. Yes, that is the one I saw and I took it for a contract.

Q. When did you first see this, Ben?

A. Well, I think it was sometime after the 8th of August; I could not say exactly the time. * * *

Q. I show you now defendant's Exhibit No. 2, a plat of the building; do you recognize that?

A. I do; that is her own drawing.

Q. Was that with this agreement?

A. Yes, it was.

Q. Did you see Mr. Gillis with relation to this agreement?

A. I did." (Italics ours.)

Irene testified on direct (T. p. 126):

"Q. I hand you Exhibit No. 1 and ask if that is all Mr. Gillis gave you?

A. That is absolutely all.

Q. Does that embody the things he was to do?

A. That is the way we understood it.

Q. And the price?

A. That is the price.

Q. I hand you defendant's Exhibit for identification, Exhibit No. 2, and ask you to examine it and state whether or not that is the plat that you refer to as having given to Mr. Gillis when you first saw him?

A. That is right, it is.

Q. And on the subsequent day, did—when he gave you Exhibit One, did he return to you this plat?

A. That is right, he did.

Q. Had that been changed in any way?

A. Not a bit.

Mr. Cochran. Now, I intended to have a larger plat of this made, Your Honor. However—now, Mrs. Gillette, will you just show the Court what additions on this plat—what was to be put on the building?

The Court. I think I understand it.

Mr. Tanner. Frankly, we would like to see that too.

(Defendant pointed out to Court the work that was to have been done.)

Mr. Cochran. Did he build the addition on the west end?

A. No.

Q. And that extended the full width of the house?

A. That is right.

Q. Is that what is referred to in the memorandum that he gave you, 'to complete the addition as shown'?

A. I would say so.

Q. And that was not completed at all?

A. No, sir.

Q. And nothing was done on it?

A. No.

Q. Why?

A. Because I told him we were not ready to do it yet. He came down to ask us if we were going to let him do our work and I said yes, but we were not going to put on the 8x30 part; we

just wanted the 7x17 porch made into a dining room. We did not say anything about reducing the price at that time."

[Evidence of additional or separate agreement.]

"Q. Did the price of $2872.28—did that include building this 30 foot addition?

A. Sure.

Q. And you told him he need not build that?

A. That's right." (Italics ours.)

And Irene said, p. 137:

"Q. Just what did you discuss with him, Mrs. Gillette, as to what was to be done?

A. Well, I did not discuss it a great deal. It was marked quite plainly and we told him that was what we wanted done.

Q. I believe you testified that Mr. Gillis came subsequently and asked about the work, did you, Mrs. Gillette?

A. He came two or three days later and said, 'Did you folks decide to let me do your work?'

Q. Was Ben there?

A. Yes, he was there.

Q. Had you shown it to him?

A. Yes, I had, and talked it over.

Q. He did not come inside?

A. Just poked his head in the front door.

Q. What did you and Ben say about his going ahead?

A. We said yes, but we were not going to have the 30x8 built on. The plat showed what we were not going to have done. We did not discuss the price and thought we would never have any trouble with the contract.

Q. What did Mr. Gillis say with reference to the addition to be put on, the 8x30?

A. He did say, when he handed me this plan back and the contract, he said he might not be able to do the inside finishing on the 8x30 until spring. That was the main reason why we did not have it done, because we thought we would be torn up probably through the cold weather or something."

Irene, on cross-examination, T. p. 151:

"Q Well, Mrs. Gillette, there are a lot of ways to build an addition.

A. Well, we agreed to furnish the material.

Q. Then, there was nothing discussed with Mr. Gillis relative to the kind of materials that would go into the building?

A. No, there was not.

Q. In other words, that was left to your instructions?

A. On the contract it says so."

Ben testified further on redirect, T. p. 176:

"Mr. Cochran. * * * Now Ben, this building was moved onto the concrete foundation above the basement—onto the basement foundation about what time? About what time was it that the plaintiff in this case, Mr. Gillis, got this building moved onto the basement?

A. I wasn't down there to know, but I would say sometime *in November.*" (Italics ours.)

Ben said, T. p. 177:

"Q. Now, Ben, what was the condition of the building when he put it on there, with reference to being open and exposed to the weather?

A. Well, the windows in the basement were all open and the new addition was all open, and

the building was left alongside of the cement there for several days. They took all the men and went to work for Grant Jackson, and let the basement freeze up.

Q. Did the basement freeze up, you say?

A. I did, yes.

Q. Why?

A. Well, the reason was because the building was not on in time."

And Ben, p. 165:

"Q. Now, Mr. Gillette, after you told him to go ahead on the work, when did he start on it?

A. When did he start? Well, I think it around the *16th of September*——

Q. What did he do then, Ben?

A. He started to tear out the forms out there, and he poured cement——" (Italics ours.)

Irene said on direct examination, T. p. 130:

"Q. It is admitted that you paid to Mr. Gillis on this agreement the sum of $1000.00, isn't it?

A. That is right.

Q. When was that paid?

A. On *October 10th.*" (Italics ours.)

Defendant's Exhibit No. 1, written memo, and defendant's Exhibit No. 2, drawing, do not conflict with any of the foregoing testimony.

II. SEPARATE AGREEMENT—LABOR AND MATERIALS.

Appellant contends (Br. p. 33) that labor and materials were not furnished by virtue of a separate agreement within the meaning of Finding of Fact,

Paragraph IV. (T. p. 45.) In support of the finding, we here refer to and adopt the foregoing testimony and quote the following:

Irene testified on direct (T. p. 128):

"Q. It was specified that no interior work on the whole house was to be done?

A. That is right.

Q. And no plumbing?

A. That is right.

Q. And no wiring?

A. That is right, no wiring.

Q. And all material furnished by you?

A. Yes. He came to us *several times* to ask if it was all right for *him* to buy it, and we said it was OK." (Italics ours.)

Ben testified on cross-examination (T. p. 186):

"Q. Now, Ben, on this construction—on the details as to what you wanted done, you instructed the plaintiff from day to day as to what you wanted done, didn't you?

A. I did not.

Q. Well, you said you tell him how the windows were to be put in?

A. Yes. Outside of that, I did not have anything more to do with it."

Ben said on direct examination (T. p. 165):

"A. When he was going to move the building. He came down and measured and I went down and told him how the windows were to go in and all that."

It is inferable from the foregoing testimony that after the August 8th agreement had been entered into,

and it had been decided to make the 7x17 porch into a dining room, a separate agreement (or agreements) were orally made which agreement required ("He came to us several times to ask if it was all right for him to buy it and we said OK.") that appellant should furnish some of the material for which appellees were to pay extra and that he was to install the windows.

III. THE ABANDONMENT OF THE CONTRACT WAS WITHOUT CAUSE AND WILLFUL.

(a) No order to stop work was given by Mrs. Gillette.

Appellant in his brief, page 33, argues that the Court should have found according to appellant's view of the conflicting evidence on the question of the abandonment of the contract. To avoid repetition in the quoting of the testimony, we intend to reply to his argument under this heading by here incorporating by reference our reply (infra) to his argument in his brief, page 39, under the heading, "Bad faith is not rightfully attributed to plaintiff." besides quoting the following testimony. In reviewing the following testimony we shall be ever cognizant of the rule enunciated by this Court in respect to the conclusiveness of a trial Court's finding on the question of "good faith".

Lassiter v. Guy F. Atkinson Co. (CCA 9), 176 F. (2d) 984, 993.

Ben testified on direct examination (T. p. 170):

"Q. When did they start to move the building?

A. On the 15th of October.

Q. Where?
A. Out into the street.
Q. How long did it remain in the street?
A. Oh, I cannot tell you that.
Q. Well, about how long?
A. Well, it was a long time; I would not say about how long."

Irene testified, on direct examination (T. p. 131):

"Q. Now, when did the plaintiff, Mr. Gillis move your house onto its present location?
A. Do you mean when he started or when he finished?
Q. When he moved it.
A. Approximately November 12th, because that was when the furnace was put in and that was done as soon as the building was on the foundation and it could be done."

Irene said (T. p. 129):

"Q. Now, when did they start to move this building from the south side of Front Street to the otherside of the street?
A. On the 14th day of October, he came in and took the stairs out that had been temporarily put in, and on the 15th, about 8 o'clock in the morning, they came and told us we would have to get out. On the morning of the 15th we were eating breakfast and they dashed in and told us we would have to get out and that they were going to move the house. And so we went to the hotel."

Irene testified, on cross-examination (T. p. 155):

"Q. Now, calling your attention, Mrs. Gillette, to your statement that you could not go into the

house until February 15th, am I correct in stating that you testified on direct examination that you had a party in your house on January 20?

A. No. That was why I spoke to Mr. Gillis and I said I wanted to have a birthday party there, and that I wanted to get into the house for Christmas and New Years, and then that I wanted to have this birthday party particularly. I did not say I had one; I said I wanted to have one."

Irene (T. p. 156):

"Q. So that your main objection is that the work was not finished?

A. That is right."

Irene, further on direct (T. p. 130):

"Q. It is admitted that you paid to Mr. Gillis on this agreement the sum of $1000.00, isn't it?

A. That is right.

Q. When was that paid?

A. On October 10th."

Ben said, on direct (T. p. 166):

"Mr. Cochran. Mr. Gillette, when were you able to move into this house? After it was on its foundation?

A. Why, we left the hotel on the 15th of February.

Q. When did you move out of your house?

A. We left on the 15th of October.

Q. And were you able to live in your house between the 15th of October and the 15th of February?

A. No."

Ben said further (T. p. 168):

"Q. Now, Ben, state the full conversation you had with Mr. Gillis the latter part of January.

A. I waited out there fifteen minutes for him to come out——

The Court. Get to the conversation——

A. Well, the conversation was about the raising of the building over the floor and he spoke about moving the tools away and told me to nail a couple of 2x4's together and put under there, and I told him I would have to get Satterlee to do something there then, and that was the last word we had."

Irene also testified, on direct (T. p. 124):

"Q. Well, in the presence of this boy, on the 16th day of December, 1946, or at any other time, did you tell Mr. Gillis in substance to stop work on the moving of your building across the street?

A. Indeed I never did; I never told him to stop work.

Q. Did you after that time talk to Mr. Gillis or speak to him about completing the job?

A. Yes, sir, I talked to him in the North Pole Bakery. I would say it was approximately two weeks before the 20th of January, because I was going to have a party for a friend's birthday. Mr. Gillis was having coffee at the counter and I walked over and said, 'When will you get us into our house?' He said, 'I am going to get to it right away.' He said as long as the basement is frozen, we cannot finish. I said, 'You will never thaw the basement in a million years.' Then he said, 'I never wanted to do that job anyway,' and I said, 'We are very well aware of that, and we

don't appreciate letting the work go and going to work for Mr. Jackson after storm.'

Q. Was that after the 16th day of January?

A. Yes, somewhere before the 20th, but after the first of the year, because I had that party in mind."

She testified (T. p. 125):

"Q. When did you negotiate with Mr. Gillis with reference to moving this building?

A. On approximately the 8th of August. I presume it might have been a couple of days before."

Ben, on cross-examination, testified (T. p. 188):

"Q. Now, you were anticipating having the cement basement?

A. Yes.

Q. And no doubt, cement pillars?

A. No.

Q. In other words, to be permanently braced, the basement would have to be poled, isn't that correct?

A. Yes, I asked him to put those posts in at the time it was moved, but those posts were never there and never did show up."

Ben, further on the same page:

"Q. And so the temporary pillars placed under the building, with heat in your furnace, would probably cause it to sag a little bit, due to the thawing, and so on?

A. It never was put in."

Ben's testimony, on direct upon this subject (T. p. 177):

"Q. Was the furnace connected up in the basement after the house was moved?

A. It was.

Q. When?

A. I think—it is hard for me to say, I was not down there.

Q. About what time was it, don't you know?

A. Well, sometime in November.

Q. Sometime in November?

A. Yes.

Q. Was fire kept in it?

A. Yes, all the time.

Q. Who kept the fire?

A. The people that worked in there had a fire there.

Q. Who was using the building?

A. Well, Mr. Gillis' men.

Q. And why did they keep a fire in it?

A. Well, so they could work."

Irene, on direct (T. p. 134):

"Q. Was it necessary then to have posts put under there?

A. It was, yes.

Q. Was Mr. Gillis requested to do that?

A. Well, Mr. Gillette went up to see him and tell him the floor had sagged."

She said also, same page:

"A. We employed Mr. Satterlee to put five posts under the house.

Q. And what did you have to pay for that?

A. That was $190.00. He did some other things along with that, like chinking up the outside, because there was no skirting on between the house and the foundation. He also put the window in

the basement; there had been a gunny sack over that."

Irene, on cross-examination, testified (T. p. 154):

"Q. Now, when did you first learn that the building had sagged on its new foundation?

A. Mr. Metrovich came to me and said, 'You better do something about your house; I don't think Mr. Gillis is going to finish it and it's beginning to sag.'

Q. When was that?

A. Well, I will tie it in with something; he said, 'You better do something about it'; I cannot tell you exactly the date.

Q. Well, I want to know about the time——

A. Well, it was a couple of days, because I came home and——

The Court. Can you place that date? That is the question.

A. Well, it is a matter of trying to remember. We estimate that he went up there the latter part of January, or somewhere in there.

Q. And it would be just a short time before that?

A. No, he went right away when we knew he wasn't going to finish it or had not even mentioned it."

Ben, on direct (T. p. 174):

"Q. Were there posts put into the building before it was moved?

A. I did——

Mr. Tanner. Pardon me—the witness has not testified to that; it is just leading again——

Mr. Cochran. Were there any posts in the building before it was moved?

A. There were.

Q. How many?

A. Well, about 8 feet apart, running right through and 24 in length.

Q. Now, who put those posts in for you, Ben?

A. When the contractor built the house——

Q. No Ben, I mean after it was sagged on its present location?

A. Oh, Pete Satterlee."

Ben, also on direct examination (T. p. 170):

"Q. Now, did the plaintiff in this case complete the basement?

A. He did not.

Q. What did he fail to complete?

A. He did not put in the basement floor——

Q. Did you discuss with him the basement floor?

A. I did, and told him where I wanted the hole for the septic tank.

Q. Was there a septic tank, you say, Ben? What did you tell him about that?

A. Yes, the septic tank was to go straight down from the floor above and there were two places to be left open when the cement was put in.

Q. Was that filled up—did you have an excavation made for a septic tank?

A. No, we did not, but I meant for him to leave a hole in the cement.

Q. He did not put in the cement, did he?

A. No.

Q. Well, who put in the floor?

A. I did.

Q. What was the condition of the floor as to being frozen or thawed?

A. Well, I thawed on it four months with wood, coal and the furnace, and I had a pump there that I circulated the water through; and I picked frost and got it in shape before starting to put the floor in.

Q. Was it necessary to thaw it?

A. It had to be thawed.

Q. How did it happen to freeze?

A. By not putting in the floor when it should be."

Irene, on cross-examination (T. p. 161):

"Q. Yes, you told us that; but what I want to know is that the records show in this case that the work ceased on the 16th day of the month?

The Court. What month was that?

Mr. Tanner. The 16th day of December, Your Honor.

A. Well, we talked to Mr. Gillis in the North Pole at least a couple of times after that, and he said he would be down any day.

Q. When did you talk to him?

A. I know it was after Christmas. It was after he got married, and that was about the first of the year.

Q. When you say 'we,' whom do you mean?

A. My husband and I. We had to eat at the North Pole.

Q. Now, you told us under direct examination that at one time you claimed you saw Mr. Gillis in January.

A. Yes. He was sitting at the counter at the North Pole, and we did very meekly ask him when he would get at our house. We just sat at the table and asked him how he was getting along with it.

Q. Well, you say you were very meek about it——

A. Well, the only time I got mad was when he said, 'Well, I didn't want to do it anyway,' and I said, 'I am well aware of it'; I never got mad before."

Ben, on cross-examination (T. pp. 186-7):

"Mr. Tanner. I won't press that, Your Honor. Now, Ben, you stated that you were up sometime the latter part of January to see the plaintiff.

A. I did.

Q. And you saw him in front of his shop?

A. Yes, I waited until he came out.

Q. And your purpose was to see if he could do some work?

A. Yes.

Q. Now, he told you why he wasn't coming back?

A. He told me he took his tools away; he did not tell me why."

Thusly it appears that the chronological order of events, even without reference to other surrounding circumstances, would be sufficient to sustain a finding of *willful* abandonment, to-wit:

Aug. 8th—Agreement made to move building before Oct. 20th.

Aug. 11th—Agreement reaffirmed with modification.

Sept. 16th—Foundation forms on new site were fixed and cement poured.

Oct. 10th—$1,000.00 was paid on contract.

Oct. 14th—Stairs to the building were removed.

Oct. 15th—Building commenced to move on rollers out into the street after the occupants had on said day vacated it.

Nov. 12th—A few days after new basement had frozen, the building arrived onto the foundation at its new location; furnace was thereupon connected up and fire thereafter maintained in it by appellant's workmen.

Dec. 16th—Appellant ceased all work.

Jan. 16 (approximately)—Appellants were informed that building had "sagged".

Jan. 16th (approximately)—Appellant told Ben that appellant had removed his tools and equipment from the job.

Feb. 15th—Appellees moved back into building only after a third party (workman) had made it possible for them to so do.

(b) The sump was "wantonly and negligently" filled in.

In addition to the foregoing and the following evidence being indicative of "bad faith" on the part of appellant, it supports Paragraph VII of the Findings of Fact (T. p. 22) to the effect that appellant had wantonly and negligently filled in the sump.

Irene testified, on direct (T. p. 135):

"Q. Did you do anything toward drainage or sumps?

A. Yes, we had Mr. Hoop put a barrel in there.

Q. And what happened to that sump?

A. It was filled in.

Q. Who filled it in?

A. Whoever put the backfill in that Mr. Gillis had down there.

Q. State whether or not it was usable after it had been filled in, Mrs. Gillette.

A. No, we had to dig a new one."

And on cross-examination (T. p. 156):

"Q. Now, speaking of the sump, Mrs. Gillette, tell us a little more about that—just what purpose the sump was fulfilling and what was done.

A. Well, it was filled in so we could not use it. That was to be used for the overflow for the septic tank."

And on page 157:

"Q. Did you, or anyone that you know of, point out this sump to Mr. Gillis?

A. I did myself. I said, 'Don't fill up our sump.'

Q. To Mr. Gillis?

A. Yes."

Irene said further, on direct (T. pp. 142-143):

"Q. * * * Now, was there a sump prepared in this basement?" (Deletion ours.)

"A. Yes, there was.

Q. Explain what that was.

A. We had Mr. Hoop come with his equipment and thaw several holes there and then they put down this barrel, a big tank, to use, and the drain was under where he thawed out.

Q. What happened to that?

A. That was filled in.

Q. By whom?

A. By Mr. Gillis.

Q. What did you have to do subsequently?

A. We had to dig a new sump."

Irene, on cross-examination, said (T. p. 160):

"Q. Well, all right. Now, relative to this sump that you talked about, Mrs. Gillette, you mentioned that the cost—as a matter of fact, how was it fixed?

A. There was a big tank put in there. I know it was, and there was a tank outside connected with this sump, and there was a big oil tank put in——

Q. It was to be used as a cesspool?

A. It was to be an overflow."

Irene, under cross-examination, testified (T. p. 157):

"Q. Did you, or anyone that you know of, point out this sump to Mr. Gillis?

A. I did myself. I said, 'Don't fill up our sump.'

Q. To Mr. Gillis?

A. Yes."

(c) One corner was wantonly cut off.

The following testimony not only tends to also show bad faith on the part of appellant, but it supports the Court's finding contained in Paragraph IX of the Findings of Fact (T. p. 47) to the effect that plaintiff wantonly cut off one corner of the house in the moving of the same and failed, neglected and refused to repair the said damage, to-wit:

Ben, on his direct, said (T. pp. 181-182):

"Q. You say you don't know who cut that corner off?

A. No.

Q. Did you?

A. No.
Q. Did you have it done?
A. No, I did not."

Irene said, on direct (T. p. 146):

"Q. Now, the corner that was cut off of the cornice of this building—has that ever been repaired?
A. No, it has not.
Q. As to the cutting of that off—did you authorize Mr. Gillis to cut that off?
A. I did not.
Q. Did you know anything about it?
A. No, he came into the office——
Q. Did Mr. Gillis have any conversation with you with reference to that?
A. Well, he came to the office——
Q. What do you mean by 'the office'?
A. The Nome Motor Company office, and he said, 'We have got to cut the corner off the cornice,' and I said, 'Why don't you have the telegraph poles removed?'; but when I came back, the corner was cut off.
Q. Did he have the telegraph poles removed?
A. He did.
Q. What do you estimate the cost of repairing the cornice that he took off?
A. I would say $100.00."

Irene, on cross-examination, said (T. p. 160):

"Q. Now, Mrs. Gillette, you first stated, I believe, didn't you, that you did not know anything about the cutting off of the cornice?
A. Not until it was done.
Q. Well, then didn't you state afterwards that Mr. Gillis came down to the office of the Nome

Motor Company and told you that he was going to cut it off?

A. Well, he had already cut it off—he must have, because I went down there that night and it was done——

Q. When did he see you?

A. Well, after 5 o'clock, I went down to see what had happened. I don't know when he did it, but before he moved the poles it was done."

We respectfully submit that the testimony we have quoted hereinabove furnishes positive proof that there was sufficient basis in the evidence for the trial Court's finding not only that the abandonment was without cause and willful, but that appellant was guilty of "bad faith" in his non-performance of his agreement with appellees. We shall now devote our attention to the remaining question of the six listed in his summary, the argument on which is set forth in his brief, page 5, under the heading, "Analysis of Court's Findings, Conclusions and Judgment."

IV. THE EVIDENCE SUPPORTS THE AMOUNT OF DAMAGES FOUND.

(a) Basement damage $327.50.

On page 7 of the brief, appellant under sub-title, "Amount of damages inconsistent with evidence," argues in effect that there was no basis in the evidence for the finding that appellees were damaged in the amount of $327.50 for appellant's failure to complete the concrete basement, or for the finding that appellees were damaged in the sum of $190.00 for

appellant's failure to repair the damage he did to the house by permitting it to stand unbraced and thereby causing the floor to sag five inches in the center. We intend to now show that there was a sufficient basis in the evidence to support each of the said findings.

Ben testified, on cross-examination (T. p. 173):

"Q. Can you give me approximately the number of hours you put in in thawing, and the basement floor preparing to put in the cement, and putting it on? Putting the cement on?

A. Oh, about 160 hours.

Q. Do you know what is paid regularly in Nome for that character of work?

A. I don't know.

Mr. Tanner. Just a minute—this man has not established himself.

The Court. The answer was that he doesn't know.

Mr. Cochran. Now, Ben, did you do all the work yourself in pouring this basement floor?

A. I did.

Q. And there were close to nine cubic yards put on the floor?

A. Of cement? Yes.

Q. You mixed it all yourself?

A. I did."

For some evidence of the reasonable value of such work, the trial Court had before it the testimony of the witness, Margraf. Appellant urges this Court to use Margraf's testimony as a gauge for determining reasonable value. (Br. p. 42.) Margraf testified that his charge for (comparable) work is $2.00 per hour.

(b) Damages for leaving house unbraced.

Irene testified, on direct (T. p. 134):

"A. We employed Mr. Satterlee to put five posts under the house.

Q. And what did you have to pay for that?

A. That was $190.00. He did some other things along with that, like chinking up the outside, because there was no skirting on between the house and the foundation. He also put the window in the basement; there had been a gunny sack over that."

Irene (T. pp. 140-141):

"Q. Have you the receipt for the amount you paid him for that work?

A. I have my cancelled check. I have two cancelled checks; he did two jobs. I have one check for $175.00 and one for $17.00; $15.00 of that was putting in the basement windows; $175.00 was for the braces and taking off the ice and snow from the roof on the addition.

Q. What was the total amount you paid?

A. $190.00 we entered.

Q. Are there $2.00 there we overlooked?

A. The check for $17.00—$15.00 in here and probably $2.00 for something else.

Q. Did this pay for that work?

A. Yes.

Mr. Tanner. What work?

A. Taking ice and snow off of the roof, raising the house the five inches it sagged and putting in the basement window that was left out with a gunny sack over it. I think he also finished the partition there that was started and never finished.

Mr. Tanner. In other words, completing the house?

A. Well, we had some more done after that, Mr. Tanner.

Mr. Tanner. Well, that was putting in braces to keep it from sagging?

A. To keep it from sagging again."

The total number of hours at $1.75 per hour which go to make up the one of the two checks which was for a total of $175.00 is shown (T. p. 142) to be (47 hours plus 18 hours plus 35 hours) 100 hours.

The two cancelled checks totalled $192.00.

The Court found (T. p. 49) that appellees were entitled to but $190.00.

Instead of the evidence being insufficient to show the amount of the damages which the Court allowed, the evidence shows more damages than the Court actually allowed.

V. THE FINDINGS SUPPORT THE CONCLUSIONS OF LAW AND JUDGMENT.

a) Court found appellant was entitled to $1,000.00 for his labor.

In his argument (Br. p. 6), under the heading, "Conclusions and Judgment Inconsistent with Findings", appellant contends that even if he concedes that the findings be true that "the plaintiff's abandonment of the work was willful and without cause," that nevertheless appellant should not thereby lose any balance due him for labor under the contract.

(Appellant is evidently not yet willing to accept the Opinion of this Court (T. p. 39) in his first appeal.)

The finding, Paragraph III (T. p. 44) that (appellant) "plaintiff continued to work on said dwelling from time to time until Dec. 15th, 1946 * * *" when read in conjunction with another finding in the same paragraph, "that on October 10, 1946, defendants paid to plaintiff the sum of $1,000.00 to apply on the total cost" as well as the findings as a whole, is conclusive not only upon the question of what constitutes the reasonable value of appellant's labor but of the amount of work plaintiff performed.

Appellant's contention must therefore be based upon the false assumption that the trial Court is compelled to believe the testimony of appellant in matters in which he was not contradicted by other testimony.

Even if there be no conflict in the evidence, the question of whether the testimony of a witness should be believed, is one upon which the finding of the trial Court is conclusive.

Weber v. Calif. Gold Mines (CCA 9), 121 F. (2d) 663;

Lerner Stores v. Lerner (CCA 9), 162 F. (2d) 160.

(b) Appellees are not precluded by the amount asked in the ad damnum clause in their cross-complaint.

Appellant complains further (Br. p. 7) that, because appellees, in their cross-complaint (T. p. 14), failed to pray for general relief but instead alleged as follows:

"That by reason of the breach of said contract by the plaintiff and his failure to move said dwelling and have the same ready for occupancy as provided for in said agreement, the defendants have been damaged in the sums and amounts as herebefore stated and in the total sum of $2,597.14.

"Wherefore the defendants pray judgment against the plaintiff for the sum of $724.86; and for the costs and disbursements herein incurred, including a reasonable attorney's fee.",

that the judgment for $391.17 in favor of appellees (T. p. 52), cannot be permitted to stand.

We see no merit in such contention especially in view of the power of the Court to allow amendments even to the *ad damnum* clause so as to enable it to grant a larger amount of relief than the amount demanded in the pleadings.

15 *Amer. Jur.,* Damages, Sec. 303, p. 745.

Appropriate relief under the facts pleaded, despite the designation of the cause or the prayer for relief, will be granted.

Johnson v. Jackson (DC Pa.), 82 F. Supp. 915; Affmd., 173 F. (2d) 223.

VI. CONCLUSION.

In conclusion we here incorporate and adopt by reference "Brief for Appellees" on appellant's first appeal herein and we respectfully submit that not only is each of the findings supported by the evi-

dence but that the findings support the conclusions and judgment.

The judgment should therefore be sustained.

Dated, San Francisco, California,
June 5, 1950.

Respectfully submitted,
CHELLIS CARPENTER,
Attorney for Appellees.